

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 11

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEITH CAIN and JANET CAIN

Appeal No. 2001-1844
Application No. 09/178,951

ON BRIEF

Before FRANKFORT, STAAB and NASE, Administrative Patent Judges.
FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1 through 5, all of the claims pending in this application.

As noted on page 4 of the specification, appellants' invention relates to a food storage organization system that provides the user with a convenient means by which to label

Appeal No. 2001-1844
Application No. 09/178,951

leftover food containers in their refrigerators, indicating the date upon which the container was placed in the refrigerator. Representative independent claim 1 can be found in Paper No. 4, filed April 10, 2000.

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Namisniak et al. (Namisniak '160)	5,711,160	Jan 27, 1998
--------------------------------------	-----------	--------------

Johnson	5,934,707	Aug. 10, 1999 (filed May 30, 1997)
---------	-----------	---------------------------------------

Claims 1 through 5 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Namisniak '160 in view of Johnson. On page 3 for the answer, the examiner has set forth her position that

Namisniak '160 teaches a food organization system including marker means 22 attached to the lid of a food storage container and calendar means (Figures 1 and 2) which correlates with the markers. The date upon which a food storage container was placed inside the refrigerator can be ascertained by matching the marker means to the calendar.

Namisniak '160 does not teach the use of magnets as the marker system, however, this is common in the art. Johnson teaches using magnetic means to attach

markers (column 3, line 13). Johnson also teaches a magnetically responsive surface (column 2 lines 1-4) for attaching the magnets. It would have been obvious to a person having ordinary skill in the art to utilize the magnets of Johnson in the device of Namisniak '160 to provide an easier to use marker system.

The markers of Johnson include a variety of colors and shapes.

Rather than reiterate the examiner's further comments regarding the above-noted rejection and the conflicting viewpoints advanced by the examiner and appellants regarding the rejection, we make reference to the examiner's answer (Paper No. 10, mailed September 18, 2000) for the reasoning in support of the rejection, and to appellants' brief (Paper No. 9, filed September 11, 2000) for the arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to appellants' specification and claims, to the applied prior art references, and to the respective positions articulated by appellants and the examiner. As a consequence of

Appeal No. 2001-1844
Application No. 09/178,951

our review, we have made the determination that the examiner's above-noted rejection will not be sustained. Our reasons follow.

Before turning to the merits of the rejection before us on appeal, we note our agreement with the examiner's position (answer, page 4) that Johnson is available as a reference in the present case under 35 U.S.C. § 102(e) since that patent is "by another" and its filing date of May 30, 1997 is before the filing date of the present application (October 26, 1998) and appellants have not provide any evidence to prove an actual date of completion of the invention prior to the filing date of the Johnson patent (see, 37 CFR § 1.131).

In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness (see In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993); In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992)), which is

established when the teachings of the prior art itself would appear to have suggested the claimed subject matter to one of ordinary skill in the art (see In re Bell, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993)). The conclusion that the claimed subject matter is *prima facie* obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention. See In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988).

Looking at the examiner's rejection, we observe that the only difference identified by the examiner between the subject matter of appellants' claim 1 on appeal and the food storage tracking system of Namisniak '160 is that Namisniak '160 "does not teach the use of magnets as the marker system" (answer, page 3). However, our review of appellants' independent claim 1 and Namisniak '160 reveals other deficiencies in the primary reference that have not been addressed by the examiner. More specifically, claim 1 on appeal sets forth, *inter alia*, a

plurality of marker means having a ferromagnetic base supporting identification indicia and "an anchoring plate having a ferrous composition... permanently affixed to the lid of a food storage container and allowing for the removable attachment of said marker means thereto."

While we would view the magnetic tabs (12) of Namisniak '160, seen in Figures 1, 2 and 4, etc., as being "marker means" comprising a ferromagnetic base supporting identification indicia, we find nothing in Namisniak '160 that corresponds to the anchoring plate of ferrous composition permanently affixed to the lid of a food storage container and allowing for the removable attachment of marker means thereto, as set forth in appellants' independent claim 1. A review of the Johnson patent applied by the examiner in combination with Namisniak '160 likewise reveals no such "anchoring plate" permanently affixed to the lid of a food storage container. Thus, like appellants, we find that the references applied by the examiner fail to disclose or teach every element of the claimed subject matter and that it is only through the use of impermissible hindsight that the examiner could conclude that

Appeal No. 2001-1844
Application No. 09/178,951

it would have been obvious to one of ordinary skill in the art to combine the teachings of the applied references to Namisniak '160 and Johnson so as to arrive at the claimed invention defined in appellants' claims 1 through 5 on appeal.

The examiner's assertion (answer, page 3) that it would have been obvious to a person having ordinary skill in the art to utilize the magnets of Johnson in the device of Namisniak '160 to provide for an easier to use marking system, in no way accounts for the difference we have noted above. This is especially true since we see no substantive difference between the magnetic tabs (12) of Namisniak '160 that are applied to the calendar means therein and the masks (e.g., 16, 18, 20) that are applied to the calendar in Johnson. While Namisniak '160 (col. 4, lines 20-29) makes reference to reusable bands or disposable tapes that match identifier swatches on the base unit (10) and which may be used to mark prepackaged perishable items, we find nothing in the applied references relied upon by the examiner which teaches or suggests the particular form

Appeal No. 2001-1844
Application No. 09/178,951

of container marker arrangement set forth in the claims before us on appeal.

The examiner's further observation on page 5 of the answer that "Namisniak teaches labeling containers so as to remember dates... and Johnson teaches a removable, reusable system for labeling special days on a calendar," while true, does nothing to render obvious the particular food age organization system defined in appellants' claims on appeal.

In light of the foregoing, we will not sustain the examiner's rejection of claims 1 through 5 under 35 U.S.C. § 103(a) as being unpatentable over Namisniak '160 and Johnson. The decision of the examiner is, accordingly, reversed.

REVERSED

CHARLES E. FRANKFORT)
Administrative Patent Judge)
)

Appeal No. 2001-1844
Application No. 09/178,951

LAWRENCE J. STAAB
Administrative Patent Judge

JEFFREY V. NASE
Administrative Patent Judge

)
)
) BOARD OF PATENT
) APPEALS
) AND
) INTERFERENCES
)
)
)
)
)

CEF/ki

Appeal No. 2001-1844
Application No. 09/178,951

Law Offices of John D. Gugliotta
Suite 202
137 South Main Street
Akron, OH 44308